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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,
and
Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,

Respondents.

MOTION TO VACATE AND REMAND

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

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Court of Criminal Appeals, State of Oklahoma,

Respondents.

MOTION TO VACATE AND REMAND

Comes now Petitioner, MYER AARON RUHM, and respectfully moves that the Judgment of the United States Court of Appeals for the Tenth Circuit herein be vacated and the Cause be remanded to the said Court of

Appeals for further consideration in the light of the Tenth Circuit's own subsequent decision(s) of *Terry Lee Radcliff* v. *Anderson, Warden*, No. 73-1520, and *Grider, Warden* v. *William Lynn Stringfield*, No. 73-1550 (consolidated), June 14, 1974.[1]

In support of his instant Motion, the Petitioner would respectfully allege as follows:

1. The primary substantive argument raised by Petitioner is that the decision of *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, should be accorded retroactive effect, at least to those litigants, like Petitioner, whose convictions were still non-final in the State courts at the time of the promulgation of the *Lamb* decision, supra.

2. In the recent *Radcliff and Stringfield*, supra, the Tenth Circuit has held *Lamb* fully retroactive.

3. The recent *Radcliff and Stringfield a fortiori* voids (or at least arguably voids) Petitioner's conviction herein challenged.

WHEREFORE, premises considered, Petitioner urges that this case may now be more expeditiously processed at the Court of Appeals level; and that in the interests of judicial economy and the orderly administration of justice, the previous decision of the Court of Appeals herein should be vacated and remanded to the

[1]Petition for rehearing en banc pending.

said Court of Appeals for further consideration in the light of the Tenth Circuit's own recent decision(s).

Respectfully submitted,

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103
Attorney for Petitioner

MEMORANDUM OF LAW

A. Substantive Summary

The law by which Petitioner was convicted as an adult and a felon (as opposed to a juvenile and a delinquent) was the now-defunct 10 Okla.Stat. 1971, Sec. 1101(a), which protected female offenders with juvenile status (as mere delinquents) until age 18, but which relegated male offenders (for the same violations) to the retributive harshness of the adult criminal code of the State of Oklahoma (as felons) at age 16. In other words, amongst the class composed of children 16 and 17 years of age committing the same violations, Oklahoma

discriminated — and discriminated *severely* — in the administration of its substantive criminal justice on the archaic basis of the penally irrelevant and constitutionally impermissible criterion of the youthful offender's biological sex. Since the male Petitioner was only 17 when convicted (as an adult and a felon) for the offense of Possession of Marijuana, whereas a similarly (or even worse) offending like-aged female would at most have been adjudicated a juvenile delinquent, this Petitioner is therefore attacking his purported adult, felony conviction primarily on the obvious basis of Fourteenth Amendment (Sexual) Equal Protection.

This vicious sexual discrimination that has victimized this teenaged male Petitioner has long since been held unconstitutional as violative of Equal Protection. *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18. Compare the virtually identical *Long* v. *Robinson* (D.Md., 1970) 316 F.Supp. 22, aff'd 436 F.2d 1116 (4th Cir., 1971). And, since Petitioner's direct appeal to the Court of Criminal Appeals of the State of Oklahoma was still pending when *Lamb* v. *Brown*, supra, was announced, he naturally sought relief under its provisions; which, however, the State Court denied on the grounds that *Lamb* was nonretroactive. *Ruhm* v. *State* (Okla.Cr., 1972) 496 P.2d 809, at 815.

An action in Federal District Court was likewise unsuccessful, and on the same grounds. *Ruhm* v. *Turner, et al.* (W.D.Okla., 1973) 357 F.Supp. 324. Thereafter, an appeal to the Court of Appeals for the Tenth Circuit was also unsuccessful (although on the basis of what Petitioner submits were wholly irrelevant and insubstantial procedural grounds). *Ruhm* v. *Turner, et al,* 10th Cir., No. 73-1259, February 4, 1974 (unreported).[2]

However, on June 14, 1974, the Court of Appeals for the Tenth Circuit, itself, in its consolidated decision(s) of *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden* v. *William Lynn Stringfield,* Nos. 73-1520 and 73-1550, reproduced at Appendix A hereto, held *Lamb* v. *Brown,* supra, to be fully retroactive, and in the process expressly repudiated the remarks in the original *Lamb* opinion suggesting a non-retroactivity thereof (456 F.2d at 20) as mere *obiter dictum* (see page pp. A7-A8 to Appendix A hereto).

Thus, and although the inevitable petition for rehearing en banc is pending (see Appendix B hereto), it appears that the Tenth Circuit is now persuaded of the validity of *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, *cert. den.* 413 U.S. 922 (which held fully retroactive the virtually identical *Long* v. *Robinson* decision(s), supra, 316 F.Supp. 22, 436 F.2d 1116), and convinced of

[2]This and the previous cited opinions affecting Petitioner are fully reproduced in the Appendix to his Petition for a Writ of Certiorari herein.

the applicability of *Robinson* v. *Neil* (1973) 409 U.S. 505, and similar cases. And, with the retroactive rise in the Oklahoma age of juvenility to 18 which has been brought about by the retroactive interpretation of *Lamb* v. *Brown*, this Petitioner's purported adult conviction is now, at last, exposed as not only 'merely' *erroneous*, but indeed, as an absolute *jurisdictional* nullity, see *Ex Parte Powell* (1912) 6 Okla.Cr. 495, 120 Pac. 1022, *Ex Parte Parnell* (1921) 19 Okla.Cr. 273, 200 Pac. 456, *Ex Parte Brown* (1929) 43 Okla.Cr. 339, 278 Pac. 671, and similar cases.

B. Procedure

At the time Petitioner filed his instant Petition for a Writ of Certiorari herein (on May 6, 1974), the prevailing sentiment within the Tenth Circuit appeared to be to the effect that *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, was non-retroactive. See id., 456 F.2d at 20, and this Petitioner's own unsuccessful attempts to convince any Court of the contrary. Petitioner therefore had no recourse but to seek relief before the Supreme Court of the United States.

Since the filing of the Petition herein, however, the Tenth Circuit has either changed or clarified its outlook, and now holds *Lamb* v. *Brown*, supra, fully retroactive. *Terry Lee Radcliff* v. *Anderson, Warden*, and *Grider, Warden* v. *William Lynn Stringfield*, Nos. 73-1520 and

73-1550 (consolidated), June 14, 1974, Appendix A hereto.[3] Since this Petitioner's conviction was still non-final (as pending on direct appeal to the Oklahoma Court of Criminal Appeals) on the date of the *Lamb* v. *Brown* decision, then *a fortiori* this Petitioner is entitled to relief under *Lamb* by virtue of the recent *Radcliff and Stringfield*, supra, see *Linkletter* v. *Walker* (1965) 381 U.S. 618, 625-627.

And, since the retroactive increase in the age of male juvenility from 16 to 18 brought about by *Radcliff and Stringfield* has in effect rendered this Petitioner's purported adult conviction a *jurisdictional* nullity,[4] it is extremely doubtful that the Court of Appeals, if presented again with Petitioner's case, would now let mere procedure stand in the way of adjudicated substantive law and constitutional justice.

Since it would appear that relief is now fully available at the Circuit level, there scarcely remains much reason to consume the Supreme Court's time and attentions with Petitioner's case - but for, of course, the fact that Petitioner was denied relief below before the promulgation of the Circuit's recent retroactivity ruling.

[3]Petition for rehearing en banc pending, see Appendix B.

[4]See *Ex Parte Powell* (1912) 6 Okla.Cr. 495, 120 Pac. 1022, *Ex Parte Parnell* (1921) 19 Okla.Cr. 273, 200 Pac. 456, and *Ex Parte Brown* (1929) 43 Okla.Cr. 339, 278 Pac. 671, and similar cases.

In such cases, therefore, the proper procedure for the Supreme Court is to "vacate and remand to the _____ Court of _____ for further consideration in the light of [some recent decision]."

Normally, of course, the "recent decision" is a recent *Supreme* Court decision. However, precedent does exist for the "vacate and remand" procedure when the recent decision is by a lower court, whether a Court of Appeals, see *U.S. ex rel. Robinson* v. *Johnston* (1942) 316 U.S. 649, or even on occasion by a State court, see *Rivas* v. *Cozens* (1972) 409 U.S. 55.

Therefore, and given the recent developments and present posture of this case, the Petitioner would submit that the proper procedure herein, and the one most expeditious of economizing available judicial manpower while yet preserving the substantial rights of the instant Parties involved, would be for this Honorable Court to vacate the action of the Court of Appeals, and to remand the cause herein for further consideration in the light of the Tenth Circuit's own recent decision(s) in *Radcliff and Stringfield*, supra.

Respectfully submitted,

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED

JUN 14, 1974

HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1974

TERRY LEE RADCLIFF Petitioner-Appellant, v. PARK ANDERSON, WARDEN, Respondent-Appellee.	)	No. 73-1520
WILLIAM LYNN STRINGFIELD, Petitioner-Appellee, v. JOHN GRIDER, WARDEN, OKLAHOMA STATE REFORMATORY, SAM ISAACS, PROBATION AND PAROLE OFFICER, DEPARTMENT OF CORRECTIONS, STATE OF OKLAHOMA, Respondents-Appellants.	)	No. 73-1550

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 73-C-81 and No. 72-C-236)

Fred P. Gilbert (Andrew T. Dalton, Jr., on the brief) for Appellant Radcliff and Appellee Stringfield.

Kay Karen Kennedy, Assistant Attorney General (Larry Derryberry, Attorney General of Oklahoma, on the briefs), for Appellee Anderson and Appellants Grider, et al.

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The issue is the retroactivity of *Lamb* v. *Brown*, 10 Cir., 456 F.2d 18, which held that 10 Okl. St. Ann. §1101 (Supp. 1969) was unconstitutional in that it violated the equal protection clause of the Fourteenth Amendment. Section 1101 allowed the benefits of juvenile court proceedings to females under the age of 18 years but limited those benefits to males under the age of 16 years. The opinion concluded with the statement that: "This ruling shall not apply retroactively." Ibid. at 20.

We now have two habeas corpus cases each brought in the Northern District of Oklahoma by a male who was denied juvenile court proceedings because of age. Petitioner-appellant Radcliff, at age 17, was prosecuted as an adult and found guilty of unauthorized use of a motor vehicle. Petitioner-appellee Stringfield, when 17 years old, was prosecuted and sentenced as an adult for second degree burglary. Each claims that §1101 unconstitutionally deprived him of the right of juvenile proceedings and, hence, the adult proceedings cannot be sustained.

No. 73-1520 is an appeal from the denial of the habeas petition of Radcliff. Judge Daugherty construed the *Lamb* decision as deciding that the issue there involved was procedural rather than substantive and held that he was bound to follow the declaration that *Lamb* had no retroactive application. Accordingly, he dismissed the habeas action.

No. 73-1550 is an appeal by the warden of the Oklahoma reformatory from the grant of the habeas petition of Stringfield. Judge Barrow held that the action taken in *Lamb* was substantive and that the declaration of nonretroactivity was dictum, not binding on him. Accordingly, he granted the habeas writ.

The *Lamb* decision is the law of the circuit and we are concerned only with its retroactivity. There are

decisions that an unconstitutional law must be taken as having no effect whatsoever from the very date of its enactment. See *Chicago, Ind. & L. Ry. Co.* v. *Hackett*, 228 U.S. 559, 566; *Norton* v. *Shelby County*, 118 U.S. 425, 442; and *Ex parte Siebold*, 100 U.S. 371, 376. Later cases have rejected this holding. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374; and *Linkletter* v. *Walker*, 381 U.S. 622-629. Accordingly, retroactivity must be determined in the light of recent decisions of the Supreme Court.

During its last term the Court reviewed the subject in *Robinson* v. *Neil*, 409 U.S. 505, and *Gosa* v. *Mayden*, 413 U.S. 665. The opinions in those cases analyzed and scrutinized the Court's previous decisions on retroactivity. Any attempt on our part to reexplore the field would be nonproductive. It is enough that none of the decisions referred to in *Robinson* and *Gosa* treat the specific issue before us. *Robinson* was concerned with the retroactivity of *Waller* v. *Florida*, 397 U.S. 387, which barred, on double jeopardy grounds, two prosecutions, state and municipal, based on the same act of offense. In holding that *Waller* was fully retroactive, the Court said that the practical result of the constitutional provision against double jeopardy "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." 409 U.S. at 509.

Gosa v. *Mayden*, 413 U.S. 665, was concerned with the retroactivity of *O'Callahan* v. *Parker*, 395 U.S. 258, which held that a serviceman charged with a nonservice connected crime was entitled to indictment by grand jury and trial in a civilian court. A plurality of the Supreme Court held that *O'Callahan* should "be accorded prospective application only." 413 U.S. at 685. The Court recognized three dominant considerations applicable to a determination of retroactivity. They were (1) purpose of the new constitutional rule, 413 U.S. at 679, (2) reliance on the old rule, Ibid. at 682, and (3) effect on the administration of justice, Ibid. The Court commented that consideration also must be given to "the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt." Ibid. at 685.

The application of the *Gosa* tests to the issue before us produces no ready answer. The purpose of *Lamb* was to end sex discrimination in juvenile proceedings. The reliance on §1101 was confined to the period between January 13, 1969, its effective date (see statement preceding §1101 in 1 O.S. 1971), and the March 16, 1972, decision in *Lamb*. The record contains nothing to show the impact of *Lamb* on the administration of justice, other than the two cases before us and the possibility of others wherein sex discrimination occurred during the

three-year period. The interests of society must be balanced against "essential justice" to the individuals. See *Gosa*, 413 U.S. at 685.

We have here no question of the accuracy of the fact-finding process. We assume that the adult proceedings to which these boys were subjected resulted in the determination of the truth. In any event, the integrity of the fact-finding process is not an absolute criterion. See *Robinson*, 409 U.S. at 508 citing *Furman* v. *Georgia*, 408 U.S. 238. *Robinson* points out that the post-*Linkletter* cases giving prospective application to procedural rules did not involve "the basic fairness of the earlier trial." 409 U.S. at 509.

The Oklahoma statutes give to children benefits not allowable to adults. These include form of petition (§1103), custody (§1104), release to parents (§1107), temporary detention (§1108), conduct of hearings, including a provision for privacy (§1111), and discretionary certification for adult proceedings after a preliminary hearing (§1112(b)).

Mr. Justice Black, concurring in *In Re Gault*, 387 U.S. 1, 59, said that the juvenile laws "provide a system of courts, procedures, and sanctions deemed to be less harmful and more lenient to children than to adults." The petitioners were denied the benefits of the system which Oklahoma provides for children. Accordingly, we are

concerned here with both basic fairness and essential justice.

Woodall v. *Pettibone*, 4 Cir., 465 F.2d 49, dealt with the retroactivity of a federal decision holding unconstitutional upon the ground of denial of equal protection certain Maryland statutes permitting different treatment of juveniles in mentioned geographical areas. The court said that to deny in one area the opportunity to take advantage of diminished responsibility as a juvenile and to allow it in another area "is so fundamentally unfair as to impeach the validity of the 'adult' proceedings and render unreliable the guilty verdicts obtained in those proceedings." 465 F.2d at 52.

A certiorari application in *Woodall* was denied by the Supreme Court, see 413 U.S. 922, on the same day that it decided *Gosa*. Although denial of certiorari has normally no implication or inference, we believe that the denial in *Woodall*, when coupled with the disparity of views expressed in the four opinions filed in *Gosa*, is some indication of the attitude of the Supreme Court towards the problem before us. *Cf. United States* v. *Kras*, 409 U.S. 434, 443.

No question of retroactivity was presented in *Lamb*. The statement that its ruling should not apply retroactively, see 456 F.2d at 20, is dictum which arises no higher than "comment merely *obiter*." *Hawks* v. *Hamill*,

288 U.S. 52, 59. We believe that the principles of "basic fairness" mentioned in *Robinson* and "essential justice" mentioned in *Gosa* require that the *Lamb* decision be applied retroactively.

In 73-1520, Radcliff, the judgment is reversed and the case is remanded to the district court for further proceedings in the light of this opinion.

In 73-1550, Stringfield, the judgment is affirmed.

SETH, Circuit Judge, Dissenting:

I respectfully dissent from the majority opinion. The panel which decided *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.), stated that the holding therein would be applied prospectively only. This to me is a provision properly part of the opinion to express its application and effect. Such a statement is within the authority of a court in the application of its opinions, and is an expression of court policy on the subject. Thus the matter of whether the issue was raised by the parties is not a consideration. Parties are not expected to raise in the pleadings matters relating to an application of an opinion in the same case.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TERRY LEE RADCLIFF,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	No. 73-1520
	)	
PARK ANDERSON, Warden, Oklahoma State Penitentiary,	)	
	)	
	)	
Respondent-Appellee.	)	

WILLIAM LYNN STRINGFIELD,	)	
	)	
Petitioner-Appellee,	)	
	)	
vs.	)	No. 73-1550
	)	
JOHN GRIDER, Warden, Oklahoma State Reformatory, SAM ISAACS, Probation and Parole Officer, Department of Corrections, State of Oklahoma,	)	
	)	
	)	
Respondents-Appellants.	)	

[CONSOLIDATED CASES]

JULY TERM - JULY 10, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. Mc-

Williams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

The Court, upon its own motion, and in order to correct clerical error, withdraws the Order regarding the En Banc Hearing which was entered in the consolidated cases above on July 9, 1974, and in substitution therefor, enters the following Order:

Upon the suggestion of the respondent-appellee in No. 73-1520 and of the respondents-appellants in No. 73-1550 and upon a vote of the Judges in regular active service, it is ORDERED:

1. The petition for rehearing of these consolidated cases shall be heard and determined by the Court sitting en banc pursuant to 28 U.S.C. §46(c).

2. The rehearing is limited to the issue of the retroactivity of this Court's decision in *Lamb* v. *Brown*, 456 F.2d 18, that 10 Okl. St. Ann. §1101 (Supp. 1969) is unconstitutional.

3. The parties to these consolidated cases may file such additional or supplemental briefs as they may desire on or before July 29, 1974.

4. The parties to case No. 71-1355, *Lamb v. Brown*, shall be given notice of this Order and may appear and file briefs on or before July 29, 1974.

5. No oral argument on the rehearing will be permitted unless the Court so Orders on its own motion.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By: /s/ Anne Cabot
Deputy Clerk